ARBITRATION ACT: STAY AND APPEAL ISSUES

REPORT FOR DISCUSSION 24

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Invitation to Comment

Deadline for comments on the issues raised in this document is November 30, 2012

This Report for Discussion by the Alberta Law Reform Institute (ALRI) explores procedural issues arising out of the *Arbitration Act* concerning partial stays of court proceedings under section 7(5), appeals to the Queen's Bench under section 44, and the role of arbitral appeals generally.

The purpose of issuing a Report for Discussion is to allow interested persons the opportunity to consider these issues and to make their views known to ALRI. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when the ALRI Board makes its recommendations.

You can reach us with your comments or with questions about this document on our website, by fax, mail or e-mail to:

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on January 1, 1968 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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This and other Institute reports are available to view or download at the ALRI website: www.alri.ualberta.ca.

Acknowledgments

This report is designed to inform readers of the issues in this area, encourage discussion about appropriate legal policies and solicit readers' input about solutions.

Debra Hathaway, Counsel, conducted the main research and analysis for this project and wrote the report. Some preliminary research was done by William Hurlburt QC, ALRI Consultant, and Karen McDougall, Consultant. Peter Lown QC, Director, and Sandra Petersson, Research Manager, provided editorial support. Student research assistance was supplied by Suzette Golden-Greenwood, Jenna Reist and Lara Yeung. The report was prepared for publication by Barry Chung.

Summary

A modern *Arbitration Act* became law in Alberta in 1991. In the two decades since then, three notable procedural issues have arisen in Alberta case law which affect the ideal functioning of the arbitration system.

These procedural issues involve diametrically opposed views of what the correct interpretation of the Act should be. In their own way, all sides of these issues may be considered credible and supportable. For this reason, the report poses open-ended questions rather than consulting on preliminary recommendations. An open-ended debate will be of greater benefit to advise and guide ALRI on possible reform.

Partial Stays

The first procedural issue concerns partial stays of competing court proceedings under section 7(5). Partial stays work well when arbitrable and litigable issues are reasonably separable, which is a prerequisite to the operation of section 7(5). But what should a court do when the competing litigation involves additional parties who are not subject to the arbitration agreement, arbitrable and litigable issues which cannot be reasonably separated, or both? One approach provides that the arbitration agreement must be upheld even if multiplicity of proceedings results – in other words, what can be arbitrated must be arbitrated. Another approach interprets section 7(5) as conferring independent discretion on a court to stay the arbitration and require all issues to be litigated by the parties, despite the existence of an arbitration agreement between some or all of them. The report asks readers to indicate which approach should prevail.

The report also explores some alternative ideas concerning certain aspects of the main issue. In applying section 7(5), would it be helpful if the Act stated a test or list of factors to help courts determine whether it is reasonable to separate issues? If so, what might that test or list of factors be?

Another alternative concerns the situation where the competing litigation involves only the parties to the arbitration agreement and raises additional issues that are not reasonably separable from the arbitration issues. Should the Act empower a court to stay the litigation and send all the issues to arbitration, even though this extends the reach of the arbitration agreement beyond that to which the parties originally agreed?

A final alternative asks whether different rules should be enacted for parties engaged in commercial arbitration, as opposed to those engaged in other types of arbitration such as consumer, family or community disputes? Based on assumptions about the nature of such parties, arbitration agreements could be more strictly enforced for commercial parties than for others. Another option might be to have stricter enforcement of those arbitration agreements which contain consciously and deliberately crafted parameters, as opposed to those which simply contain standard form or boilerplate clauses.

Public Interest Requirement for Leave to Appeal

The second procedural issue explored by the report concerns appeals by leave to the Queen's Bench. Must a public interest requirement be met before leave to appeal a question of law can be granted under section 44(2)? The Act is silent on this point, but a significant line of Alberta case law has read in such a requirement.

The underlying policy reasons for that requirement are debatable. Maybe it is needed to justify the use of public courts by private arbitration parties? Yet litigation between other parties typically proceeds without any need to satisfy a public interest component. Perhaps it reflects the public interest in ensuring that the general law is developed and applied in a consistent way? If so, when differences arise that are significant enough to engage this public interest, access to the courts should be available. Yet arbitrators' decisions do not serve as precedents for other arbitrators or any other decision-maker. Usually such decisions affect only the parties to the arbitration.

Readers are asked to comment on whether a public interest requirement should be imposed when seeking leave to appeal. If so, what kinds of factors should satisfy it?

The Appeal Barrier of Section 44(3)

The third procedural issue dealt with by the report also concerns appeals to the Queen's Bench. A uniquely Alberta procedural requirement is found in section 44(3). Whether an appeal on a question of law occurs by agreement of the parties or by leave of the court, section 44(3) says that a party may not appeal a question of law that the parties expressly referred to the arbitral tribunal for decision. Alberta case law is sharply divided over what this means. A wide interpretation essentially blocks the appeal process and makes any appeal on a question of law virtually impossible. The report explores various options, including complete repeal of section 44(3).

Appeals Policy

During ALRI's examination of the two appeal issues, recurring policy tensions became apparent which point to a deeper underlying issue: what is the proper relationship between arbitration and the courts? The policy basis of section 44 seems to be unclear, ambiguous or even contradictory. The legislation provides appeal routes and yet undermines them at the same time.

Is it time to rethink the role of arbitral appeals in a more fundamental way? Could striking a new balance between competing policy considerations mean doing away with some or all appeals? On one hand, court appeals may promote better justice between the parties and correct wrong interpretations of the law. On the other hand, arbitrating parties have deliberately chosen to seek their justice outside the court system. Why should that decision not prevail at every stage of the proceedings?

The report explores this issue in its final chapter. Various appeal rights are considered, ranging from abolition of some or all appeal routes to different rights depending on the type of arbitration. Varying degrees of difficulty in obtaining leave are outlined as another possibility. Readers' input is encouraged and welcomed.

Issues

PARTIAL STAYS

Table of Abbreviations

LEGISLATION

Alberta Act	*Arbitration Act*, RSA 2000, c A-43
British Act	*Arbitration Act 1996* (UK), c 23
International Act	*International Commercial Arbitration Act*, RSA 2000, c I-5
Uniform Act	*Uniform Arbitration Act*, online: ULCC <www.ulcc.ca/en/us/Arbitrat_En.pdf >

LAW REFORM PUBLICATIONS

ALRI Report	Institute of Law Research and Reform (Alberta), *Proposals for a New Alberta Arbitration Act*, Report 51 (1988)
BC Report	Law Reform Commission of British Columbia, *Report on Arbitration*, Report 55 (1982)

SECONDARY SOURCES

Chapman	John J Chapman, "Judicial Scrutiny of Domestic Commercial Arbitral Awards" (1995) 74 Can Bar Rev 401
Commercial Arbitration in Canada	J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada*, loose-leaf (consulted in June 2012), (Aurora, Ont: Canada Law Book, 2011)

CHAPTER 1

Introduction

A. Alberta's *Arbitration Act*

[1] A modern *Arbitration Act* became law in Alberta in 1991.[1] The statute was largely based on recommendations made by the Institute of Law Research and Reform (now the Alberta Law Reform Institute).[2] ALRI's recommendations were also supplemented by Alberta Justice during the implementation process. A main principle of the modern Act is to seriously limit and delineate court intervention in arbitration.

[2] The Alberta Act has now been governing arbitration in this province for over two decades. During that time, three notable procedural issues have arisen in Alberta case law which affect the ideal functioning of the arbitration system. The first issue concerns partial stays of court proceedings under section 7(5). The second and third issues both concern appeals to the Queen's Bench under section 44. Must a public interest requirement be present before leave to appeal can be granted under section 44(2)? And do the requirements of section 44(3) actively work to negate the entire appeal process in most cases?

[3] ALRI believes it is time to revisit these statutory sections to determine the best resolution of these issues. This Report examines the three procedural issues in detail and seeks input.

[4] During ALRI's examination of the two appeal issues arising out of section 44, recurring policy tensions became apparent which point to a deeper underlying issue: what is the proper relationship between arbitration and the courts? Is it time to rethink the role of arbitral appeals in a more fundamental way? Could striking a new balance between competing policy considerations mean doing away with some or all

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[1] *Arbitration Act*, SA 1991, c A-43.1, now *Arbitration Act*, RSA 2000, c A-43 [Alberta Act]. It governs arbitration between Albertans or between Albertan and Canadian parties. Commercial arbitration between Albertan and international parties is governed by the *International Commercial Arbitration Act*, SA 1986, c I-6.6, now *International Commercial Arbitration Act*, RSA 2000, c I-5 [International Act].

[2] Institute of Law Research and Reform (Alberta), *Proposals for a New Alberta Arbitration Act*, Report 51 (1988) [ALRI Report].

appeals? The Report examines this broader issue in its final chapter and seeks input.

B. Framework of the Project

[5] ALRI seeks first to consult with stakeholders in this area through this Report for Discussion. Stakeholders include participants and practitioners in the arbitration field (including non-lawyer advocacy and industry groups), the legal profession and the judiciary.

[6] All of the procedural issues involve diametrically opposed views of what the correct interpretation of the sections should be. In their own way, all sides of these issues may be considered credible and supportable. Appropriate recommendations for resolution of the issues are not obvious and depend ultimately on wider policy decisions about the proper relationship between arbitration and the courts. For this reason, ALRI is posing open-ended questions in this Report for Discussion rather than consulting on preliminary recommendations formulated in advance. An open-ended debate will be of greater benefit to advise and guide ALRI on possible reform.

[7] Following its consideration of the consultation results, ALRI will issue a Final Report containing its recommendations.

C. Outline of this Report

[8] Following Chapter 1's general introduction, Chapter 2 addresses partial stays of court proceedings under section 7(5) of the Alberta Act. Ways to clarify this difficult area are explored.

[9] Chapter 3 asks what requirements should be met under section 44(2) in order to obtain leave to appeal an arbitral decision on a question of law. Must the public interest be a factor?

[10] Chapter 4 examines whether a broad or narrow interpretation should be given to section 44(3)'s concept of "a question of law that the parties expressly referred to the arbitral tribunal for decision." A broad interpretation of that concept largely negates the appeal process ostensibly created by section 44.

[11] Chapter 5 explores whether reform needs to go beyond simply addressing the particular issues raised by case law. Does an appeal route continue to be needed in some or all cases or is it time to rebalance the relationship between arbitration and the courts?

CHAPTER 2

Partial Stays

A. The Primacy of Arbitration under Section 7(1) and 7(2)

[12] If a party to an arbitration agreement commences a court proceeding regarding a dispute covered by that agreement, the Alberta Act is designed to force that party to honour the agreement to arbitrate, except in very limited and specified circumstances. Section 7 provides:

> **Stay**
>
> **7(1)** If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.
>
> **(2)** The court may refuse to stay the proceeding in only the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;
>
> (d) the application to stay the proceeding was brought with undue delay;
>
> (e) the matter in dispute is a proper one for default or summary judgment.
>
> **(3)** An arbitration of the matter in dispute may be commenced or continued while the application is before the court.
>
> **(4)** If the court refuses to stay the proceeding,
>
> (a) no arbitration of the matter in dispute shall be commenced, and
>
> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.

> **(5)** The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that
>
> (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and
>
> (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.
>
> **(6)** There is no appeal from the court's decision under this section.

[13] Under section 7(1), the court has a mandatory statutory obligation to stay the court proceedings, thus allowing the arbitration process to prevail. Only if one of the very limited grounds in section 7(2) exists can the court refuse to stay the litigation.

[14] While section 7 is designed to enforce agreements to arbitrate, it is deliberately drafted in an indirect way for conceptual reasons. The law of arbitration rests on what is called "the doctrine of party autonomy." As a private dispute resolution process, arbitration exists entirely outside the court system and occurs only by agreement of the parties. No one can be compelled by a court to arbitrate without their consent or prior agreement.[3] And, at common law, the parties remain equally free to litigate. An arbitration agreement cannot oust the courts' jurisdiction over the dispute. Such a provision is illegal and void as against public policy. So, at common law, parties to an arbitration agreement could still bring a court action and the court must exercise its jurisdiction to hear it.[4]

[15] A statutory provision is required to authorize or direct a court to refuse to exercise its jurisdiction. This is what section 7 does. Staying the action and refusing access to court proceedings does not cause a court to breach the doctrine of party autonomy. It has not ordered or compelled the parties to arbitrate. They are simply left with no other option except arbitration if they want to resolve the dispute.[5] "Traditionally it has been

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[3] J Kenneth McEwan & Ludmila B Herbst, *Commercial Arbitration in Canada*, loose-leaf (consulted in June 2012), (Aurora, Ont: Canada Law Book, 2011) at para 2:100.10 [*Commercial Arbitration in Canada*].

[4] *Commercial Arbitration in Canada* at para 3:40.10.10.

[5] *Commercial Arbitration in Canada* at para 3:40.10.10.

said that courts will not order specific performance of arbitration agreements, in the sense that they will not order parties to proceed to arbitration. Courts do not compel arbitration; enforcement is negative in that they stay the court proceedings in specified circumstances."[6]

[16] This is also why section 7 never states directly or overtly that a court is authorized to stay an arbitration. If the court refuses to stay the litigation, section 7(4) simply provides that an arbitration shall not be commenced or continued. The arbitration is halted by operation of the statute, not by order of the court.

[17] The indirect language of section 7, conceptually necessary though it may be, contributes to the difficulty of interpreting what section 7 does and does not authorize a court to do.

B. Partial Stays under Section 7(5)

[18] Section 7(5) allows the court to provide a partial stay of court proceedings in some circumstances, so that certain issues will be arbitrated and others will be litigated. If there are issues in dispute which are not covered by the arbitration agreement, the court may allow those issues to be litigated if it is reasonable to separate them from the arbitrable issues. In such a situation, the court can order a partial stay of the litigation so that the arbitrable issues will proceed to arbitration and the other remaining issues will be litigated.

[19] The distinction which section 7(5) requires to be made between matters in dispute is hard enough when it is only the arbitration parties who are involved in the competing litigation. Adding additional parties to the court proceedings makes the situation even more difficult. Those new parties are not subject to the arbitration agreement at all and so issues involving them cannot be arbitrated. Litigation is the only way to decide their liability.

[20] Section 7(5) was not contained in the 1988 ALRI Report on which the Alberta Act is largely based. It appears to have originated in the Uniform Law Conference of Canada's 1989-90 *Uniform Arbitration Act*.

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[6] *Commercial Arbitration in Canada* at para 3:40.10.10. The seminal case in this area is *Doleman & Sons v Ossett Corp*, [1912] 3 KB 257 at 268-70 (CA).

Unfortunately the ULCC materials do not discuss or even mention section 7(5)'s intended purpose, meaning or effect.[7] The provision is also present in the arbitration statutes of those provinces which have implemented the Uniform Act.[8] Alberta Justice added section 7(5) to the implementation bill which became the 1991 Alberta Act.

C. The Problem

[21] A partial stay under section 7(5) only works when it is reasonable to separate the matters in dispute, which the section requires as a prerequisite.

[22] But what happens when litigable issues involving some or all of the parties cannot reasonably be separated from the arbitrable issues of the parties who are subject to arbitration? A real dilemma is created and the system breaks down. In this situation, any stay of proceedings against the arbitration parties can only be a *de facto* partial stay because not all the issues or parties are subject to the arbitration agreement. Yet here a *de facto* partial stay will eventually lead to a multiplicity of proceedings concerning the same issues in different settings, between different parties, with different decision-makers and with potential for contradictory decisions on facts, law or both.

[23] It is not clear from section 7 what should be done in this situation. Must arbitration prevail between the parties to the arbitration agreement even if it leads to a multiplicity of proceedings? Must section 7(1) and 7(2) take precedence as between the parties to the arbitration agreement and a stay of court proceedings be ordered against them, even if other parties proceed to litigate the same issues?

[24] Or, despite section 7(5)'s ostensible restriction to partial stays, can a court act under that provision to refuse to stay the litigation in its entirety?

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[7] See generally Uniform Law Conference of Canada, *Proceedings of the Seventy-first Annual Meeting* (1998) at 77-78 and Appendix B; Uniform Law Conference of Canada, *Proceedings of the Seventy-second Annual Meeting* (1990) at 36 and Appendix A. The electronic version of the Act, as amended, is found at Uniform Law Conference of Canada, *Uniform Arbitration Act*, online: ULCC <www.ulcc.ca/en/us/Arbitrat_En.pdf> [Uniform Act].

[8] *The Arbitration Act*, CCSM c A120, s 7(5); *Arbitration Act*, SNB 1992, c A-10.1, s 7(5); *Commercial Arbitration Act*, SNS 1999, c 5, s 9(5); *Arbitration Act, 1991*, SO 1991, c 17, s 7(5); *The Arbitration Act, 1992*, SS 1992, c A-24.1, s 8(5). Prince Edward Island enacted the Uniform Act 16 years ago but it remains unproclaimed: *Arbitration Act*, SPEI 1996, c 4, s 7(5).

In other words, can the court prevent multiplicity of proceedings by using section 7(5) to override the arbitration agreement and send every party and every issue to litigation?

[25] Courts have responded to this dilemma in two ways.

1. SECTION 7(1) AND 7(2) MUST GOVERN

[26] When some or all parties are involved with issues that are not reasonably separable, some courts nevertheless require the parties to the arbitration agreement to arbitrate their issues as agreed. The other issues and parties proceed to litigation (although litigation may be temporarily stayed pending completion of the arbitration). These courts give priority to their mandatory duty under section 7(1) to stay litigation where agreements to arbitrate exist. According to this approach, a court cannot ignore its statutory obligation simply because litigation might be fairer to the parties or because arbitration might cause some "tactical, juridical or financial disadvantage" to a party.[9] The presence of additional parties and possible multiplicity of proceedings are not exceptions listed in section 7(2) which allow a court to refuse a stay of litigation in regard to arbitrable issues.[10]

[27] A leading case supporting this approach is the 1992 Alberta Court of Appeal decision in *Kaverit Steel & Crane Ltd v Kone Corp.*[11] The Court noted that in modern commercial disputes, the problem of multiple parties and proliferating litigation will often be present, but "the statute commands that what may go to arbitration shall go. No convenience test limits references [to arbitration]."[12]

[28] However, subsequent Alberta cases often ignore or distinguish *Kaverit Steel* because it interpreted Alberta's International Act, not the Alberta Act. Both statutes place a mandatory duty on courts to stay litigation where an arbitration agreement exists, but the International Act

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[9] *Engineered Transportation and Rigging Co v Babcock & Wilcox Industries Ltd*, [1997] OJ No 2312 (QL) at para 14 (Gen Div).

[10] WH Hurlburt, "A Note on Escape from Arbitration Clauses: Effect of the New Arbitration Act" (1992) 30 Alta L Rev 1361 at 1365.

[11] *Kaverit Steel & Crane Ltd v Kone Corp* (1992), 120 AR 346 (CA), rev'g (1991), 119 AR 194 (QB), leave to appeal to SCC refused, [1992] SCR vii [*Kaverit Steel*].

[12] *Kaverit Steel*, note 11, at para 8.

does not have a provision explicitly authorizing a partial stay of litigation like the Alberta Act does.

2. SECTION 7(5) CREATES INDEPENDENT JUDICIAL DISCRETION

[29] Other courts respond to the dilemma of additional parties and issues that are not reasonably separable by using section 7(5) to refuse to stay the court proceedings in regard to any issue or any party. Despite the arbitration agreement which binds some of the parties, courts sometimes allow litigation of all the issues between all the parties and essentially stay arbitration of any aspect. This result conflicts with the court's general obligation under section 7(1) to stay litigation between arbitration parties except in the specific situations listed in section 7(2). But it does prevent multiplicity of proceedings.

[30] How do courts justify essentially staying an arbitration in its entirety under section 7(5)?

[31] Although on its surface section 7(5) deals only with partial stays of court proceedings in certain circumstances, many courts have interpreted it as nevertheless creating an independent judicial discretion to deal directly with arbitral proceedings. Moreover, this independent discretion is neither limited by nor subservient to the mandatory stay of litigation under section 7(1) and the strictly limited exceptions of section 7(2). According to this reasoning, if a court cannot grant a partial stay of court proceedings under section 7(5) because the issues cannot be separated, the court's only alternative under that section is to refuse to stay any of the court proceedings, thereby effectively staying the arbitration.[13] This approach was endorsed by the Ontario Court of Appeal in a 2007 decision called *Radewych v Brookfield Homes (Ontario) Ltd*, in which the Court noted as well that a full stay of arbitration is also consistent with provincial judicature statutes giving courts a general power to prevent multiplicity of legal proceedings.[14]

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[13] *MacKay v Applied Microelectronics Inc*, 2001 NSSC 122 at paras 31-36; *Shaw Satellite GP v Pieckenhagen*, 2011 ONSC 4360 at paras 42-44; *Hammer Pizza Ltd v Domino's Pizza of Canada*, [1997] AJ No 67 (QL) at para 9 (QB).

[14] *Radewych v Brookfield Homes (Ontario) Ltd*, 2007 ONCA 721 at para 3 [*Radewych*]. In Alberta, see the *Judicature Act*, RSA 2000, c J-2, s 5(3)(f) and the *Alberta Rules of Court*, Alta Reg 124/2010, rr 1.3, 1.4(1) and 1.4(2)(h).

[32] Section 6(c) of the Alberta Act can also play a procedural role in allowing a stay of arbitration to be sought on the basis that a multiplicity of legal proceedings would be a manifestly unfair or unequal treatment of the arbitration parties. Section 6 provides:

> **Court intervention limited**
>
> **6** No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards.

[33] The Alberta Court of Appeal pronounced this interpretation of section 6(c) in the 2004 case of *New Era Nutrition Inc v Balance Bar Co.*[15] While a main purpose of the Alberta Act is to delineate and restrict court interference in arbitrations, the Court pointed to the presence of section 7(4) and 7(5) as an indication that the Legislature did not want multiplicity of proceedings to result. But the Alberta Act does not explicitly allow anyone to apply for a stay of arbitration. A party to an arbitration agreement who wants to have all issues litigated must instead apply for a stay of that litigation under section 7 and then argue for rejection of his or her own application. The Court found this indirect method to be peculiar and disingenuous. It doubted that the Legislature intended that effect.

[34] The Court noted that sections 6(c), 7(4) and 7(5) were all added by Alberta Justice and did not appear in the ALRI Report on which the Alberta Act was based. They represent the government's rejection of ALRI's proposal to restrict court intervention only to those matters

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[15] *New Era Nutrition Inc v Balance Bar Co*, 2004 ABCA 280 [*New Era*].

specifically listed in its version of section 7(2).[16] Taken together, all these factors mean that:[17]

> ... the Legislature intended that the courts use subsection 6(c) to provide a remedy to cure unfairness arising from matters not covered by the specific language of the legislation.... [S]ubsection 6(c) allows a party, faced with both a statement of claim and a notice to arbitrate, to apply to stay the arbitration on the basis that the matters in the two proceedings overlap and cannot be reasonably separated.

[35] The most recent Alberta case to deal with additional parties and issues that are not reasonably separable is *Lamb v AlanRidge Homes Ltd*,[18] where the plaintiffs sued their home builder despite an arbitration clause in their contract, along with several subcontractors who were not parties to the main construction contract containing the arbitration clause. The plaintiffs claimed joint and several liability among the defendants for the principal deficiencies of the construction. The claim covered both tort and breach of contract.

[36] At the Queen's Bench level, the Court stated that, if the only defendant in the litigation had been the builder AlanRidge Homes, the arbitration clause would prevail and the action would be stayed under section 7(1). But the presence of other defendants who were not subject to the arbitration process, together with the inseparability of the claims as between the builder and subcontractors, meant that AlanRidge Homes could not be granted a partial stay of the litigation under section 7(5). To do so would result in a multiplicity of proceedings. The Court distinguished *Kaverit Steel* and stayed the arbitration, citing the *New Era* and *Radewych* cases as authority for doing so.

[37] The Alberta Court of Appeal held that it could not rule on this area of controversy because section 7(6) of the Alberta Act provides there is no

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[16] Although the ALRI Report did not contain a recommendation for a partial stay, it is important to note that the Institute's draft Act did include court discretion to refuse a stay of litigation under its version of section 7(2) if the arbitration agreement did not bind all the parties to the dispute: see s 8(2)(a)(iv) at p 75. However, there is no discussion in the Report of the basis for or implications of that provision.

[17] *New Era*, note 15, at para 43.

[18] *Lamb v AlanRidge Homes Ltd*, 2009 ABCA 343, aff'g 2009 ABQB 170 [*Lamb*].

appeal of a court decision made under section 7. In *obiter* comments, however, the Court said that section 7 is[19]

> ... far from a model of clarity and, in particular, the intended scope of subsection (5) is far from clear.... [which] suggests that legislative review and amendment may be appropriate, especially in circumstances in which appellate review of decisions under section 7 is precluded.

3. CRITICISM OF THE TWO APPROACHES

[38] Advocates of applying section 7(1) and 7(2) argue that section 7(5) of the Alberta Act should not be interpreted so as to defeat arbitration agreements because that undermines the purpose of the entire Act. If courts do not stay litigation so that parties must honour their agreements to arbitrate, the value and utility of such agreements will be lost. Any clever counsel could subvert an arbitration agreement by thinking up additional issues and adding additional parties to a claim.[20] Agreements to arbitrate would not be worth the paper on which they are written.

[39] Advocates of an independent judicial discretion under section 7(5) argue that it prevents the greater evil of multiplicity of proceedings. Their opponents' approach simply creates unnecessary expense, contradictory decisions and uncertain results, all in the name of conceptual purity.

[40] Clarifying section 7 will involve deciding which of these two case law approaches should prevail in the Alberta Act.

[41] In addition, aspects of some issues might benefit from an alternative approach or solution as discussed in the next part of this chapter.

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[19] *Lamb*, note 18, at paras 16, 18, ABCA decision.

[20] WH Hurlburt, "A Note on Escape from Arbitration Clauses: Effect of the New Arbitration Act" (1992) 30 Alta Law Rev 1361 at 1367; *Commercial Arbitration in Canada* at para 3:40.90.60. Of course, if additional parties are clearly unconnected to the claim, a court can remove them by amending or striking out the deficient pleadings: *Alberta Rules of Court*, Alta Reg 124/2010, r 3.68.

D. Alternative Ideas

1. ASSESSING WHETHER ISSUES CAN BE REASONABLY SEPARATED

[42] As already noted, a partial stay under section 7(5) works well if it is reasonable to separate the matters in dispute, which the section requires as a prerequisite. The Alberta Act does not provide a test or list of factors to help assess whether it is reasonable to separate issues. Nor do courts often discuss in detail the basis for such decisions. A bare statement that the issues are so inextricably linked or intertwined that they cannot reasonably be separated is often simply presented in the written reasons as a self-evident conclusion.[21]

[43] The motion judge in the *Radewych* case did provide a bit more analysis.[22] A partial stay is inappropriate if it delays resolution of the entire matter, results in a multiplicity of proceedings, requires a significant duplication of resources or raises the danger of potentially inconsistent findings being made by different decision-makers. Another factor stated in the *MacKay* case which makes it unreasonable to separate issues is if the arbitrable claim and litigable claim are both based on the same conduct and same evidentiary base.[23]

[44] ALRI seeks opinion and input concerning whether a statutory test or list of factors would be useful in applying section 7(5) and if so, what should it comprise?

2. COMPROMISING THE DOCTRINE OF PARTY AUTONOMY

[45] As previously discussed, the doctrine of party autonomy arises out of the private, contractual nature of arbitration. Because of this, arbitration occurs only with the consent and agreement of the parties. As a general rule, party autonomy means that the parties can make whatever agreement they want concerning what is to be arbitrated, how issues will be identified, how the arbitrator will be chosen and what the rules of the

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[21] As the court did in *New Era*, note 15, and *Lamb*, note 18, for example.

[22] *Radewych v Brookfield Homes (Ontario) Ltd*, [2007] OJ No 2483 (QL) at para 23 (Sup Ct). On appeal, the Ontario Court of Appeal stated that the motion judge "was entitled to order that the entire claim proceed to trial for the reasons given by him": *Radewych*, note 14, at para 3.

[23] *MacKay v Applied Microelectronics Inc*, 2001 NSSC 122 at para 34.

arbitration will be. No one can be ordered by a court to arbitrate or not to arbitrate.

[46] However, the doctrine of party autonomy can be overcome or modified by express legislative provision.[24] Usually a legislature will only take this step if a greater social value or social need requires it. Such statutory interference is relatively rare and should not occur except in compelling circumstances. For example, in order to prevent strikes during the life of a collective agreement, the Alberta *Labour Relations Code* overrides the parties' freedom to contract and requires that every collective agreement must contain a dispute resolution mechanism to address breaches. Arbitration is statutorily deemed to be the default mechanism and so, to this extent, parties are forced to arbitrate.[25]

[47] If the correct statutory interpretation of section 7(5) is that it creates an independent judicial discretion to stay an arbitration, party autonomy is thereby modified. But is an even greater interference with the doctrine of party autonomy warranted?

[48] If a party to an arbitration agreement sues only the other party to the arbitration agreement and the litigation raises additional issues that cannot reasonably be separated from the arbitrable issues, why should a court not just be able to order that all the issues be arbitrated? A court could be statutorily authorized to fully stay the litigation in those circumstances and send everything to arbitration. Although this interferes with party autonomy by extending the reach of the arbitration agreement beyond the issues to which the parties originally agreed, could it not be justified in order to ensure a single decision-maker and to promote arbitration?

[49] If the Alberta Act were to contain such a provision, a related issue is whether the parties to the arbitration agreement should be able to agree, expressly or by implication, to vary or exclude its application.[26] Should the parties have the right to contract out of this provision or should the

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[24] *Commercial Arbitration in Canada* at para 2:100.10.

[25] *Labour Relations Code*, RSA 2000, c L-1, ss 134-146.

[26] Alberta Act, s 3, entitled "Party autonomy," allows arbitration parties to contract out of most of the Act's provisions except for a specified handful. Mandatory provisions involve fundamental matters of tribunal fairness, access to the courts and enforcement of arbitral awards.

doctrine of party autonomy be further compromised to make this provision mandatory?

3. DIFFERENT RULES FOR DIFFERENT PARTIES

[50] In balancing these difficult questions about when to honour arbitration agreements and when to allow access to the courts, would it be helpful to distinguish between parties who are engaged in commercial arbitration and parties who are engaged in other types of arbitration?

[51] Other types of arbitration in Alberta include those arising out of consumer transactions which do not involve an unfair practice under the *Fair Trading Act*,[27] new home warranty disputes and other issues between home builders and consumers, family disputes around issues like matrimonial property, membership disputes within not-for-profit community organizations, etc.

[52] The assumption is often made that commercial parties are relatively equal in business expertise, bargaining power and sophistication. If it is fair to make that assumption, then should stricter rules be applied to commercial parties? Perhaps a court should be more adamant in forcing commercial parties to honour their agreements to arbitrate, as is done in international commercial arbitration. A case might be made that the values of section 7(1) and 7(2) should predominate where commercial parties are concerned.

[53] By contrast, the general assumption regarding parties engaged in consumer, family and other types of arbitration is that greater power and expertise imbalances often exist between them. If it is fair to make that assumption, perhaps a different set of rules should be applied to such arbitration. Perhaps here a court should have a greater independent discretion to directly stay arbitration in complex cases of additional parties and issues that are not reasonably separable, so that litigation of all issues will proceed and multiplicity of proceedings will be prevented.

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[27] The *Fair Trading Act*, RSA 2000, c F-2, ss 13-19 creates a statutory civil action to deal with unfair practices in a consumer transaction. Section 16 allows arbitration clauses in consumer contracts to prevail over the statutory civil action only if the written arbitration agreement was approved by the Minister. This provision is aimed at contracts of adhesion where the consumer has no opportunity to negotiate but must simply agree to a standard contract with an arbitration clause in order to buy the desired goods or services.

[54] These general assumptions may not be the only values or considerations at play, however. Over-emphasizing their importance may distort what needs to be taken into consideration before distinguishing between types of parties.

[55] Alternatively, rather than distinguishing between types of arbitration parties, another way to apply different rules to different situations might be to examine the terms of each agreement to arbitrate. If the parties consciously crafted deliberate parameters for their arbitration, then perhaps the values of section 7(1) and 7(2) should predominate to ensure stricter application of that agreement to arbitrate. But if the parties did not put that kind of conscious effort into drafting their individual arbitration agreement but instead just used a standard form or boilerplate clause, then perhaps the court should exercise an independent judicial discretion in deciding whether litigation must be stayed when additional parties and issues are involved.

[56] Research for this project did not reveal any general arbitration statute which enacts different rules for different parties. However, consumer protection legislation sometimes enacts different arbitration rights or rules regarding consumers. For example, Ontario and Quebec both prohibit the use of arbitration clauses in consumer contracts so that consumers remain free to litigate by individual actions or class proceedings.[28] Such prohibitions recognize that consumers do not freely negotiate arbitration clauses with sellers or manufacturers. In order to purchase goods or services, consumers must of necessity agree to mandatory arbitration clauses contained in standard contracts of adhesion. Mandatory arbitration is then used to block consumer access to class proceedings, the most effective consumer remedy.

[57] One academic commentator notes that such a policy of different rules for different parties may be justified by looking at how underlying assumptions actually work in practice. Modern arbitration rules proceed on the assumption that[29]

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[28] *Consumer Protection Act*, SO 2002, c 30, ss 7-8; *Consumer Protection Act*, RSQ c P-40.1, s 11.1. Section 16 of Alberta's *Fair Trading Act*, RSA 2000, c F-2 provides more limited consumer protection in a more roundabout way, as discussed in the previous footnote.

[29] Shelley McGill, "The Conflict Between Consumer Class Actions and Contractual Arbitration Clauses" (2006) 43 Can Bus LJ 359 at 365.

> ... sophisticated disputants with relatively equal bargaining power would collaborate to design their own resolution process. Inherent in this policy was the goal of empowering disputants and giving them more control over dispute resolution.... The irony is that applying the new policy to the consumer situation has the opposite effect. Consumers have no input into the design of the dispute resolution process and the choice of arbitration is imposed on them by the business party without consultation. The result is that the consumer has no control over dispute resolution.

E. Consultation Issues

ISSUE 1

Which is the more important policy value:

(a) ensuring that parties honour their agreements to arbitrate? or

(b) preventing multiplicity of proceedings?

ISSUE 2

Are there other policy values which are more important?

ISSUE 3

When faced with the dilemma of additional parties and issues that are not reasonably separable, how should a court resolve the matter?

(a) Section 7(1) and 7(2) must govern and the parties to the arbitration agreement must arbitrate their arbitrable issues; or

(b) Section 7(5) creates independent judicial discretion and the court may stay the arbitration.

ISSUE 4

Concerning partial stays under section 7(5):

(a) Should there be a statutory test or list of factors to assess whether issues can be reasonably separated?

(b) If so, what should that test be or what should the list of factors comprise?

ISSUE 5

As an alternative approach, if competing litigation involves only the parties to the arbitration agreement and raises additional issues that are not reasonably separable from the arbitration issues:

(a) Should a court be able to stay the litigation and order that all the issues be arbitrated?

(b) If so, should parties to the arbitration agreement be able to contract out of this provision's application or should it be mandatory?

ISSUE 6

As an alternative approach, where additional parties or issues that are not reasonably separable are present:

(a) Should the Alberta Act distinguish between

(i) commercial arbitration and

(ii) consumer, family and other arbitration?

(b) If such a distinction is made, should the Act

(i) require a strict application of section 7(1) and 7(2) to commercial arbitration, and

(ii) create an independent judicial discretion to stay the arbitration in consumer, family and other arbitration?

ISSUE 7

As an alternative approach, where additional parties or issues that are not reasonably separable are present:

(a) Should the Alberta Act distinguish between

(i) agreements with consciously crafted parameters in its arbitration clause and

(ii) agreements with a standard form or boilerplate arbitration clause?

(b) If such a distinction is made, should the Act

(i) require a strict application of section 7(1) and 7(2) to cases involving consciously crafted agreements, and

(ii) create an independent judicial discretion to stay the arbitration in cases involving standard form agreements?

ISSUE 8

Are there other ways to resolve the issues and dilemmas of section 7 of the Alberta Act?

CHAPTER 3

Public Interest Requirement for Leave to Appeal

A. Appeal of Arbitral Awards

[58] Section 44 of the Alberta Act governs appeal of arbitral awards:

> **Appeal of award**
>
> **44(1)** If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.
>
> **(2)** If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.
>
> **(3)** Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.
>
> **(4)** The court may require the arbitral tribunal to explain any matter.
>
> **(5)** The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.
>
> **(6)** Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

[59] Under section 44(1), an arbitration agreement may provide that the arbitral award can be appealed to a court on a question of fact, a question of law or a question of mixed fact and law, as the parties agree.

[60] But even if the agreement does not provide for an appeal on a question of law, section 44(2) states that the parties may still appeal to a court on a question of law if the court grants leave to appeal. Section 3 of the Alberta Act states that parties cannot by agreement vary or exclude the availability of section 44(2)'s appeal by leave.

[61] Note that, before granting leave to appeal under section 44(2), the court must be satisfied about two criteria: "that (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and (b) determination of the question of law at issue will significantly affect the rights of the parties."

B. Should There Be a Public Interest Requirement?

1. ALBERTA

[62] A significant line of Alberta Queen's Bench case law has interpreted section 44(2) to include a requirement that the appeal must also be in the public interest. This interpretation first appeared in *obiter* comments made in *Warren v Alberta Lawyers' Public Protection Association*.[30] The Court noted that the parties consensually chose arbitration instead of litigation because the former is perceived to be quicker and cheaper. Since appeals are restricted and discouraged under the Alberta Act, the Court concluded that the simple loss or gain to the parties of some claim could not be the full or correct interpretation of section 44(2)'s leave criteria. Rather, some public interest or public issue must surely also need to be present to justify court intervention in the private process of arbitration.[31]

[63] Nine Alberta Queen's Bench decisions have since followed and applied *Warren*.[32] In *Sherwin-Williams Co v Walls Alive (Edmonton) Ltd*, the

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[30] *Warren v Alberta Lawyers' Public Protection Association* (1997), 208 AR 149 (QB) [*Warren*].

[31] *Warren*, note 30, at paras 14-17.

[32] *Co-operators General Insurance Co v Great Pacific Industries Inc*, 1998 ABQB 137, aff'd on other grounds 1998 ABCA 272; *Schultz v Schultz*, 2000 ABQB 866; *Oakford v Telemark Inc*, [2001] AJ No 853 (QL) (QB); *Sherwin-Williams Co v Walls Alive (Edmonton) Ltd*, 2002 ABQB 999 [*Sherwin-Williams*]; *Lion's Gate Homes Ltd v Shand*, 2008 ABQB 15; *Alenco Inc v Niska Gas Storage US, LLC*, 2009 ABQB 192; *Heredity Homes (St Albert) Ltd v Scanga*, 2009 ABQB 237; *Venneman v Mountain View (County No 17)*, 2009 ABQB 540; *Apache Canada Ltd v Harmattan Gas Processing Limited Partnership*, 2010 ABQB 288.

Court of Queen's Bench elaborated on why a public interest requirement is fair:[33]

> The parties agreed to arbitration. No one forced them to embrace this method of resolving their dispute. If either one is dissatisfied with the decision, an appeal should not be allowed if only their interests are at stake. They should be held to their agreement to avoid the civil litigation process unless it is in the public's interest for the court to allow an appeal to proceed. If the public interest requirement is lacking, the parties should be bound by the decision coming from the dispute resolution mechanism they chose.

[64] Three Alberta Queen's Bench cases since *Warren* have explicitly questioned or refused to follow its public interest requirement.[34] In *Rudiger Holdings Ltd v Kellyvone Farms Ltd*, the Court expressed "grave doubts" that section 44(2) imposes a public interest requirement since the section speaks only of "the parties."[35] However, the Court also asserted that "appeals cannot be granted simply on the basis that one party will suffer an economic loss" because:[36]

> [w]ere that the case, leave would be granted virtually as a matter of course. This would be contrary to the aims of the Act, namely to afford the parties recourse to a relatively inexpensive, timely and binding resolution of their conflicts.

[65] In *Fuhr Estate v Husky Oil Marketing Co*, the Court stated that section 44(2) simply contains no language to support the imposition of a public interest requirement. If the legislature had intended to create such a component, it would have said so in the provision.[37]

[66] Most recently, in *Milner Power Inc v Coal Valley Resources Inc*, doubt was again cast on the presence of a public interest requirement. In *obiter* comments, the Court speculated that this interpretation arose because of the "unhelpful criteria" stated in section 44(2) – unhelpful because "in almost every case the award is going to be important to the parties and

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[33] *Sherwin-Williams*, note 32, at para 18.

[34] *Rudiger Holdings Ltd v Kellyvone Farms Ltd*, 2002 ABQB 601 [*Rudiger*]; *Fuhr Estate v Husky Oil Marketing Co*, 2010 ABQB 495 [*Fuhr Estate*]; *Milner Power Inc v Coal Valley Resources Inc*, 2011 ABQB 118 [*Milner*].

[35] *Rudiger*, note 34, at para 39 [emphasis omitted].

[36] *Rudiger*, note 34, at para 39.

[37] *Fuhr Estate*, note 34, at paras 99-100.

determination of the question of law will significantly affect their rights."[38] The Court suggested that section 44(2) should be reviewed by "the appropriate government department or legislative counsel."[39]

[67] A law professor blogger suggested that ALRI should review this area as well since the section 44(2) criteria originated in its 1988 ALRI Report.[40] Unfortunately, there is no discussion of the criteria's meaning or purpose in the ALRI Report. The recollection of ALRI lawyers involved in the Report is that the criteria were designed to fortify the choice of arbitration by ruling out an automatic appeal, even on a question of law. The leave criteria were to be a safeguard against the appeal of minor or unimportant matters. However, a public interest component was certainly not intended.[41]

[68] The ALRI Report does note that the remedy of an appeal by leave on a question of law was deliberately substituted for the court's power under the old arbitration statute to set aside an arbitral award for error on the face of the award.[42] Under the old model, a party could also seek to set aside an award for arbitral "misconduct," a concept that went beyond procedural unfairness or impropriety and included errors of fact or law in the award itself.[43] The proposed Act's new approach also severely restricted a party's ability to state a case to the court on a question of law or to force the arbitrator to do so, a tactic which had long been used to delay and undermine arbitral proceedings.[44]

[69] This new approach originated from Britain's 1979 reform of its *Arbitration Act*. Those amendments also provided that a court must not grant leave to appeal unless "the determination of the question of law concerned could substantially affect the rights of one or more of the

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[38] *Milner*, note 34, at paras 21-22.

[39] *Milner*, note 34, at para 22.

[40] Jonnette Watson Hamilton, "Leave to Appeal an Arbitration Award: Is There a Public Interest Requirement?" (28 March 2011), online: University of Calgary Faculty of Law, ABlawg <ablawg.ca/wp-content/uploads/2011/03/blog_jwh_milner-power_march2011.pdf>.

[41] Information provided by PJM Lown QC, ALRI Director and WH Hurlburt QC, ALRI Director Emeritus.

[42] ALRI Report at 30.

[43] John J Chapman, "Judicial Scrutiny of Domestic Commercial Arbitral Awards" (1995) 74 Can Bar Rev 401 at 407 [Chapman].

[44] Chapman at 404. A party now needs the consent of the other parties or of the arbitrator to apply to court to determine a question of law: Alberta Act, s 8(2).

parties to the arbitration agreement."[45] This criterion appears to have been borrowed for section 44(2)(b) of the Alberta Act as well.

[70] What policy reasons support having to meet a public interest requirement in order to obtain leave to appeal an arbitral award? The implication from Alberta case law seems to be that this requirement is needed to justify use of public courts by private arbitration parties who have chosen not to rely on the court system (at least until they get a decision they don't like). Yet litigation between other parties typically proceeds without any need for a public interest component. They are also a much heavier drain on court resources since those parties use the courts for both trial and appeal purposes, whereas arbitration parties bear the cost of the original arbitral process.

[71] Perhaps the underlying policy recognizes a public interest in ensuring that the law on any particular issue will be the same whether applied by arbitrators or by the courts. If there is a danger that the law could develop differently between the two spheres, then appellate access might be justified so that a court can determine the correct legal principle. The weakness in this rationale is that arbitrators' decisions do not serve as precedents for other arbitrators or for any other decision-maker. It can be argued that a legally incorrect arbitral decision really affects only the parties to that arbitration and poses no wider danger to any general legal principle.

[72] What factors would satisfy the public interest requirement? This is also unclear. The public interest requirement has never been met in an Alberta case.[46] Nor does Alberta case law usually discuss the issue in any great detail. Failure to meet the public interest requirement is often simply presented as a self-evident conclusion. However, some features may be discerned. The question of law at issue in the case must be relevant beyond the mere personal interests of the parties.[47] For example, case law suggests that the decision would need to have a "wide ranging impact"[48]

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[45] Chapman at 411-412.

[46] *Warren*, note 30, and the cases which follow it all refused leave to appeal. For that matter, so did the cases which refused to follow *Warren*. *Ruliger*, note 34, and *Milner*, note 34, both held that the matter did not concern a question of law alone. *Fuhr Estate*, note 34, held that section 44(3) applied to block the appeal.

[47] *Schultz v Schultz*, 2000 ABQB 866 at para 60.

[48] *Lion's Gate Homes v Shand*, 2003 ABQB 15 at para 11.

on an entire industry, effect a legal change regarding future industry conduct[49] or rectify a clear error of law causing confusion in the province.[50]

[73] In the relatively few Alberta cases which do grant leave to appeal under section 44(2), there is typically no mention whatsoever of the *Warren* case or any controversy in this area or the existence of a public interest requirement.[51]

2. OTHER CANADIAN JURISDICTIONS

[74] The arbitration statutes of Manitoba, New Brunswick, Ontario and Saskatchewan have the same leave-to-appeal provision as Alberta.[52] But unlike Alberta, their courts have not "read in" a public interest requirement in addition to the other criteria.

[75] However, those jurisdictions do accept that a residual discretion exists in section 44(2), so that a court may still refuse leave to appeal even if the two criteria are met.[53] Although the *Warren* line of authority in Alberta does not cite the concept of residual discretion to justify its creation of a public interest requirement, courts which apply *Warren* clearly agree that the criteria in section 44(2)(a) and (b) are not exhaustive.[54]

[76] British Columbia's arbitration statute was not modeled on the Uniform Act and so has some noticeable differences from other provinces. Its leave criteria consist of three alternative factors, only one of which

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[49] *Venneman v Mountain View (County No 17)*, 2009 ABQB 540 at para 39.

[50] *Heredity Homes (St Albert) Ltd v Scanga*, 2009 ABQB 237 at para 41. The public interest requirement was not met in this case because a Court of Appeal decision already settled the question of law. Moreover, as the court pointed out, any decision by an arbitrator is not a binding precedent and so could not confuse this area of the law.

[51] See for example *Dacro Industries Ltd v Lombard General Insurance Co of Canada*, 2002 ABQB 88, aff'd 2003 ABCA 141; *Ainsworth Lumber Co Ltd v Grant Forest Products Inc*, 2007 ABQB 556; *Chemerinski Estate v Richter*, 2010 ABQB 388. The same judge who decided *Chemerinski* had previously decided *Sherwin-Williams*, note 32, and had applied *Warren*, note 30.

[52] *The Arbitration Act*, CCSM c A120, s 44(2); *Arbitration Act*, SNB 1992, c A-10.1, s 45; *Arbitration Act, 1991*, SO 1991, c 17, s 45; *The Arbitration Act, 1992*, SS 1992, c A-24.1, s 45.

[53] *Commercial Arbitration in Canada* at para 10:70.40.30; *Manitoba Teachers' Society v North*, 2005 MBQB 292 at paras 9-10; *Northern and Bluebird Amusement Co v 053857 NB Inc*, [2001] NBJ No 27 (QL) (QB).

[54] Jonnette Watson Hamilton, "Leave to Appeal on Arbitration Award: Is There a Public Interest Requirement?" (28 March 2011), online: University of Calgary Faculty of Law, ABlawg <ablawg.ca/wp-content/uploads/2011/03/blog_jwh_milner-power_march2011.pdf>.

needs to be met.[55] General or public importance of the question of law is one such factor.

> **Appeal to the court**
>
> **31(2)** In an application for leave..., the court may grant leave if it determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.

[77] British Columbia is the only Canadian jurisdiction with an explicit public interest requirement. As noted, it is not a mandatory requirement in every case, unlike the situation now created in Alberta by case law.

[78] From a review of British Columbia case law, the general or public importance requirement appears to be an uncontroversial requirement. However, it never seems to be relied on as the sole ground justifying leave to appeal; one or both of the other requirements is always found to be present as well. Factors held to be of general or public importance include the following:

- the court decision "would be of some assistance to the arbitral community in general" by settling an issue;[56]
- the decision could impact the level of medical services available to all British Columbia residents;[57]
- the interpretation will affect the regulation of a broad sector of public employees.[58]

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[55] *Commercial Arbitration Act*, RSBC 1996, c 55, s 31(2). This Act was based on the recommendations of the Law Reform Commission of British Columbia, *Report on Arbitration*, Report 55 (1982) [BC Report].

[56] *ITC Partners Canada Inc v Freimanis*, 2011 BCSC 1176 at para 71.

[57] *British Columbia Medical Association v British Columbia (Medical Services Commission)*, 1999 CarswellBC 614 (WL Can) at paras 6-7 (SC).

[79] The Law Reform Commission of British Columbia, which developed section 31's criteria, described their purpose as follows:[59]

> The general thrust of these criteria is to permit appeals where the determination of the point of law has ramifications beyond the immediate issue in dispute, either as between the parties or for the population at large. The intent is to prevent substantial miscarriages of justice, and also to ensure that there is some systematic development of law in arbitration.

[80] Along with the Canadian jurisdictions already discussed, British Columbia also accepts that a court still has a residual discretion to refuse leave despite the fulfilment of any or all the statutory criteria.[60] The view that a residual discretion exists in this context comes from case law interpreting Britain's 1979 leave provision. *The Nema* decision held that, in addition to meeting the statutory criteria, applicants for leave must also show that the arbitrator's decision was obviously wrong or at least *prima facie* wrong, depending on the nature of the contractual provision being arbitrated.[61] Canadian courts, however, do not go that far in specifying what is needed to satisfy the court's residual discretion. Our courts usually characterize the residual discretion as simply requiring the presence of an arguable case with sufficient merit to warrant an appeal.[62] The British Columbia Court of Appeal has held that a strict application of *The Nema* test is an undue fettering of the court's discretion.[63]

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[58] *Association of Administrative and Professional Staff v University of British Columbia*, 2007 BCSC 766 at para 47.

[59] BC Report at 82.

[60] *Shaw Cablesystems Ltd v Black*, [1993] BCJ No 37 (QL) (SC), aff'd [1993] BCJ No 1178 (QL) (CA).

[61] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)*, [1980] 3 All ER 117 (CA), aff'd [1981] 2 All ER 1030 (HL) [*The Nema*]. See also Chapman at 412-413.

[62] *Denison Mines Ltd v Ontario Hydro* (2002), 61 OR (3d) 291 (SCJ); *Manitoba Teachers' Society v North*, 2005 MBQB 292; *BCIT (Student Association) v BCIT*, 2000 BCCA 496, leave to appeal to SCC refused, [2000] SCCA No 564. Older Ontario and British Columbia cases applying *The Nema* test have now been discredited by these and other cases: *Commercial Arbitration in Canada* at para 10:70.40.30.

[63] *BCIT (Student Association) v BCIT*, 2000 BCCA 496 at paras 24-25, leave to appeal to SCC refused, [2000] SCCA No 564.

C. Consultation Issues

ISSUE 9

Does section 44(2) of the Alberta Act need legislative reform?

ISSUE 10

If legislative reform is needed, should section 44(2) be amended to expressly state that:

(a) a public interest requirement must be met to obtain leave to appeal, or

(b) there is no need to meet a public interest requirement to obtain leave to appeal?

ISSUE 11

If a public interest requirement were to be expressly stated in section 44(2), must it be met in every case or should it be an alternative requirement as in the British Columbia Act?

ISSUE 12

What kind of factors should satisfy a public interest requirement?

ISSUE 13

Are there other ways to resolve the issues involved in section 44(2)?

CHAPTER 4

The Appeal Barrier of Section 44(3)

A. Section 44(3) of the Alberta Act

[81] Whether an appeal on a question of law occurs by agreement of the parties under section 44(1) of the Alberta Act or by leave of the court under section 44(2), it is subject to the additional hurdle of section 44(3) which reads:

> **44(3)** Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

[82] This subsection was added by Alberta Justice when it implemented the 1988 ALRI Report. No such provision appeared or was recommended in the ALRI Report.

[83] As mentioned in Chapter 3, a major aspect of Alberta's arbitration reform was to enact an appeal provision in place of the court's former discretion to set aside an arbitrator's decision for error on the face of the award. Under the old law, a court would refuse to exercise its discretion to set aside the award if the error concerned the very question originally submitted to the arbitrator for decision.[64] Alberta Justice chose to retain this old common law rule and to reinsert it into the new appeal process.

B. Conflicting Alberta Case Law

[84] In both formal reasons and *obiter* comments, Alberta Queen's Bench case law is sharply divided on the proper interpretation of section 44(3). This conflict has resulted in a competing "wide view" and "narrow view" of the meaning of this section.

[85] The wide view interprets section 44(3) so broadly that if the general subject-matter of the original arbitration necessarily involves answering questions of law, then no appeal on any question of law in that area is possible either by agreement or by leave. It is not necessary for the

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[64] *Ellsworth v Ness Homes Ltd*, 1999 ABQB 287 at para 29.

question of law as framed on appeal to have been specifically posed to the arbitrator.[65] So for example, where the parties' arbitration agreement submitted "spousal support ... [and] such other issues that arise out of the above" to the arbitrator, the arbitral award cannot be appealed on any question of law whatsoever concerning spousal support.[66]

[86] The narrow view of section 44(3) interprets it as applying only to discrete, specific questions of law which were expressly posed to the arbitrator for decision.[67] Here, for example, the same phrase "spousal support ... [and] such other issues that arise out of the above" was held in *Seneviratne v Seneviratne* not to constitute questions of law expressly referred to the arbitral tribunal. It did not prevent the parties from being able to appeal on questions of law concerning entitlement and quantum of support. The reasoning is that general issues submitted to arbitration are properly classified as questions of mixed fact and law, not as questions of law. Accordingly, section 44(3) does not bar any appeal subsequently brought on a question of law alone that deals with the same subject area as the arbitration.[68]

[87] If the wide view is correct, it is hard to see how anything could ever be appealed on a question of law. What legal dispute does not involve broad questions of law? By making any appeal on a question of law virtually impossible, the wide interpretation of section 44(3) essentially blocks the appeal process ostensibly established for questions of law under section 44(1) and (2). The Queen's Bench in *Willick* stated that the legislature's intention in enacting section 44(3) is clear – to limit the role of the court in the arbitration process.[69]

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[65] *Pachanga Energy Inc v Mobil Investments Canada Inc* (1993), 138 AR 309 (QB), aff'd on other grounds (1993), 149 AR 73 (CA); *Willick v Willick* (1994), 158 AR 52 (QB) [*Willick*]; *Co-operators General Insurance Co v Great Pacific Industries Inc*, 1998 ABQB 137, aff'd on other grounds 1998 ABCA 272; *Apache Canada Ltd v Harmattan Gas Processing Limited Partnership*, 2010 ABQB 288; *Fidr Estate*, note 34.

[66] *Willick*, note 65, at paras 34-36, 40 [emphasis omitted].

[67] *Seneviratne v Seneviratne*, 1998 ABQB 289; *Oakford v Telemark Inc*, [2001] AJ No 853 (QL) (QB); *Metcalfe v Metcalfe*, 2006 ABQB 798; *Heredity Homes (St Albert) Ltd v Scanga*, 2009 ABQB 237.

[68] *Seneviratne v Seneviratne*, 1998 ABQB 289; *Metcalfe v Metcalfe*, 2006 ABQB 798.

[69] *Willick*, note 65, at para 39.

[88] Cases adopting the narrow view often rely on an article by William H. Hurlburt, Q.C. which advances and supports that view.[70] Since section 44(3) codifies the old common law rule which governed the court's former discretion to set aside an arbitral award for error on the face of the award, Hurlburt examined how the prior case law dealt with the issue. The Supreme Court of Canada relied on British authority for two central principles governing this area.[71] First, "where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court...."[72] Second, in deciding what constitutes the "very question" referred to arbitration, it is essential[73]

> ... to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision.... [I]n the former case the Court can interfere if and when any error of law appears on the face of the award, but ... in the latter case no such interference is possible....

[89] Hurlburt restates this prior formulation in the following way. Section 44(3) prevents an appeal of any identifiable question of law that is expressly referred to the arbitrator. It does not prevent an appeal of any question of law that arises during the arbitration.[74]

[90] Alberta cases which adopt the wide view of section 44(3) never refer to any of this old case law. However, Hurlburt's restatement has been criticized in one Queen's Bench decision as being inconsistent with how arbitrations occur in the real world:[75]

> With respect, whilst I accept the distinction made by Hurlburt between "an identifiable question of law" and "any question of law that arises during the arbitration," in my view, the decisions in *Seneviratne* and *Metcalfe* may have taken

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[70] William H Hurlburt, "Case Comment: *Willick v Willick*: Appeals from Awards Under the Arbitration Act" (1994) 33 Alta L Rev 178. The article identifies Mr. Hurlburt as Director Emeritus of ALRI.

[71] *Toronto Police Association v Board of Commissioners*, [1975] 1 SCR 630 at 653, 655.

[72] *Kelantin v Duff Development Company Limited*, [1923] AC 395 at 409 (HL).

[73] *F R Absalom, Limited v Great Western (London) Garden Village Society, Limited*, [1933] AC 592 at 607 (HL).

[74] William H Hurlburt, "Case Comment: *Willick v Willick*: Appeals from Awards Under the Arbitration Act" (1994), 33 Alta L Rev 178 at 186.

[75] *Fuhr Estate*, note 34, at para 111.

> those distinctions too literally. It would be exceedingly rare that a party would expressly refer a question like "What is the correct approach to use to determine retroactive support?" or "When can income averaging be used to determine child or spousal support?" Surely, when the question referred to the arbitrator is "the amount of child support", this includes any questions of law and the questions of mixed fact and law required to answer the question. In my view, if the matter expressly referred to the Arbitrator necessarily includes the question subject to appeal, then it is a question of law that was expressly referred to the Arbitrator. This is in keeping with the Act's purpose of limiting judicial intervention where the parties have indicated their intention to use an alternative dispute mechanism.

C. Other Canadian Jurisdictions

[91] No other Canadian arbitration statute contains an equivalent of Alberta's section 44(3).

[92] As mentioned earlier, section 44(3) did not originate in the 1988 ALRI Report but was added to the 1991 Alberta Act by Alberta Justice. The original Uniform Act promulgated in 1989-1990 by the ULCC was based on ALRI's work and so did not contain an equivalent of section 44(3). This probably explains why the Ontario, New Brunswick and Saskatchewan Acts are similarly silent, since they were based on the original Uniform Act. It is unknown, however, whether any of those jurisdictions first considered and rejected the Alberta Act's approach.

[93] In 1995, the ULCC amended the Uniform Act to bring its appeal provisions into line with the enacted Alberta Act. But the ULCC adopted only a modified version of section 44(3). An appeal by leave is made expressly subject to that provision. An appeal by agreement of the parties is not subject to it. There was no discussion about this provision in the ULCC proceedings.[76] But the likeliest reason for the modification is that statutorily blocking an appeal created by the parties' own agreement might constitute an unwarranted infringement of party autonomy by defeating their intention. In addition, applying section 44(3) to section 44(1) produces the odd and rather disconcerting result of making it easier

[76] Uniform Law Conference of Canada, *Proceedings of the Seventy-seventh Annual Meeting* (1995) at 39 and Appendix B. See Uniform Act, ss 45(1)-(3).

to appeal a question of fact or mixed fact and law than it is to appeal a question of law, since the former will always be broader than section 44(3)'s restriction and so will escape its blocking effect.

[94] The modified provision is also used by Prince Edward Island in its unproclaimed 1996 statute based on the 1995 Uniform Act.[77]

[95] The 1996 British Columbia Act was not based on the Uniform Act and does not contain an equivalent of section 44(3) in any event. The British Columbia Supreme Court held that the British Columbia Act's silence means that the old common law rule no longer exists in that province. It has been replaced by the statutory criteria for leave to appeal. Nor is the old rule a factor in the court's residual discretion concerning leave.[78]

[96] Both Manitoba and Nova Scotia based their Acts on the 1995 Uniform Act but presumably made a deliberate choice to exclude any such provision, modified or otherwise, in this area. The Manitoba Law Reform Commission had recommended adoption of the Alberta Act, but Manitoba Justice still excluded any equivalent of section 44(3) in their Act.[79]

D. Consultation Issues

ISSUE 14

Does section 44(3) of the Alberta Act need legislative reform?

ISSUE 15

If legislative reform is needed, which is the better interpretation of section 44(3) – the wide view or the narrow view?

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[77] *Arbitration Act*, SPEI 1996, c 4, s 45(1)-(3) [unproc].

[78] *Kovacs v Insurance Corp of British Columbia* (1994), [1995] 23 Admin L R (2d) 142 (BCSC).

[79] Manitoba Law Reform Commission, *Arbitration*, Report 85 (1994).

ISSUE 16

Should section 44(3) apply:

(a) both to appeals by agreement and to appeals by leave? or

(b) only to appeals by leave?

ISSUE 17

Alternatively, should section 44(3) be repealed so that the Alberta Act will be consistent with other Canadian jurisdictions?

ISSUE 18

Are there other ways to resolve the issues involved in section 44(3)?

CHAPTER 5

Appeals Policy

A. Is It Time to Rethink Appeals?

1. ADDRESSING UNDERLYING POLICY TENSIONS

[97] As Chapters 3 and 4 illustrate, Alberta courts have produced strikingly divergent lines of case law on issues concerning how accessible arbitral appeals should be. ALRI believes that this situation indicates a more fundamental issue concerning section 44. The policy underlying that section seems to be unclear, ambiguous or even contradictory regarding the relationship between arbitration and the courts. Should the courts to be relatively open to arbitral appeals? Section 44(1) and (2) as written seems to suggest so. Section 44(3), on the other hand, seems to suggest not, regardless of whether the parties have agreed that an appeal may be taken. This lack of clarity in the underlying policy leads to insufficient legislative direction for the courts.

[98] In order to resolve these recurrent and underlying policy tensions, is it time to rethink the role of arbitral appeals in a more fundamental way? Perhaps a new balance should be sought between competing policy considerations.

2. WHEN SHOULD COURT APPEALS BE POSSIBLE?

[99] The decision whether to allow appellate access to the courts has always been a balancing act between competing policy considerations. Appeals reduce the speed, finality and confidentiality of arbitration.[80] Parties can try to use the appeal process simply as leverage for settlement or to delay enforcement of the arbitral award.[81] Whether by agreement or by leave of the court, appeals are "predictably messy, time-consuming

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[80] *Commercial Arbitration in Canada* at para 10:10.

[81] Jonnette Watson Hamilton, "Chapter Six: Arbitration" in Julie Macfarlane, ed, *Dispute Resolution: Readings and Case Studies*, 2d ed (Toronto: Edmond Montgomery Publications Ltd, 2003) 615 at 653, n 4.

and expensive."[82] Commercial parties in particular are urged to exclude "to the fullest extent"[83] the availability of appeal in their arbitration agreements and to fully embrace arbitral awards as final.

[100] The main justification for maintaining an appeal route to the court is to allow better justice to be done between the arbitrating parties. Parties recognize this when their arbitration agreement creates the right to a court appeal, as provided in section 44(1). And if parties want a court appeal, should they not have access to the courts like any other citizen? The contrary view is that such access seems to contradict the parties' original choice to seek their justice outside the court system. If the parties want the safety net of appeal protection, they could provide in the arbitration agreement for an appeal to another arbitral tribunal. Such private appeals preserve confidentiality and may be faster.[84] A related point is that the parties agreed to pay privately for an arbitration, but the cost of an appeal judge, courtroom and related support is publicly funded. Should the parties not also privately create and pay for their own appeal mechanism if one is needed?

[101] Whether an appeal route exists by agreement or by leave of the court on a question of law, a main form of justice that a court can provide is to correct wrong interpretations of the law by arbitrators. It is asserted that the advantages of arbitration should not be purchased at the cost of substantive legal accuracy.[85]

[102] Unlike court decisions, however, arbitral decisions do not serve as precedents for other arbitrators or for any other decision-makers. If an individual decision is wrong on a point of law, there is often no continuing damage done to the general legal principle because other arbitrators are unlikely to hear of that arbitral decision and are not obliged to follow it even if they do. The assumption that a court appeal is needed to correct and protect the general legal principle may be a misplaced

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[82] Douglas F Harrison, "Drafting the Arbitration Clause: Ensuring an Effective and Predictable Process" in Osgoode Hall Law School, York University, *Negotiating and Drafting Arbitration Clauses in Commercial Agreements* (Toronto: Emond Montgomery Publications Ltd, 1997) at Tab 7, at 3.

[83] Richard B Potter, "The Pizza Pizza Quartet: Four Pizzas with Extra ADR and Hold the Appeals!" (1996), 23 BLR (2d) 277 at 283.

[84] Randy Pepper, "Ten tips to reduce time and costs in arbitration", *The Lawyers Weekly* 31:7 (17 June 2011) 10 at 12.

[85] *Commercial Arbitration in Canada* at para 10:10.

application of concerns more appropriate to the common law system of precedent and *stare decisis*. As stated by the dissenting commissioner in the Law Reform Commission of British Columbia's *Report on Arbitration*:[86]

> To men of commerce a mechanism to resolve disputes is a necessary evil en route to accomplishing their own business goals. It is we, the lawyers, who insist on redress for a decision which is wrong in law. It is worth noting that the arbitrators, generally speaking, do not consider themselves bound by other arbitrators' decisions, even, in some cases, where a similar dispute occurs between the same parties. That, in my view, indicates that the parties they serve are more concerned with resolving a dispute than establishing a body of precedent or arbitral law.

[103] A wrong legal interpretation in an arbitral decision generally affects only the parties to that arbitration. If the arbitrator misunderstands or misapplies settled law, it is indeed unfortunate for one of those parties. But, on the other hand, they freely bargained and agreed to use an arbitrator to decide their legal rights instead of the judicial process.

[104] However, where an arbitrator is trying to apply law that is already unclear or unsettled, it is beneficial to be able to appeal that question of law to a court. The court's ruling on the proper interpretation not only resolves the issue for those parties, but means the law can be correctly applied in other arbitration cases. One of the dangers of widespread arbitration in a particular area of legal practice is that development of that body of law can disappear from the general supervision of the courts. Having courts settle legal uncertainty in this situation can result in industry- or class-wide benefits.

[105] Taking all these considerations together, is a new balance needed between arbitration and the courts? Modern arbitration is designed to exist outside the court system. Is it time to exclude court appeals and make arbitration a truly self-contained dispute resolution mechanism? On the other hand, if court appeals do serve a necessary function, should they instead be available only where the parties agree?

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[86] BC Report at 88.

[106] Alternatively, rather than providing or excluding appeals for all parties, would it make sense to have different appeal models for different types of parties?

[107] In the UNCITRAL[87] model which governs modern international commercial arbitration, there is no statutory court appeal mechanism whether by parties' consent or by leave.[88] The last thing multinational businesses want is to involve foreign courts in their affairs. That's why they have arbitration agreements in the first place.[89] Parties engaged in international commerce are seen as sufficiently equal in business expertise and sophistication to safely exclude recourse to the courts.

[108] But the same may not be true in non-international arbitration. Statutes like the Alberta Act govern arbitration not only in local commercial dealings but also in consumer, family and other disputes where parties may differ in power and sophistication. Although modern non-international arbitration statutes are also based on the UNCITRAL model, recourse to the courts is typically maintained in such statutes. However, there are exceptions. Nova Scotia's legislation allows appeals only with the consent of the parties. There is no appeal by leave of the court.[90] Quebec's arbitration statute, which applies both to non-international and international arbitration, also has no appeal provisions.[91]

[109] As discussed in Chapter 2, a novel statutory approach might be to distinguish between commercial arbitration, on the one hand, and consumer, family and other arbitration, on the other. In the appeal context, different statutory models could be enacted for each of the two groups, if that approach is warranted or useful. To justify differing treatment, the same assumption of equal business expertise and sophistication would have to be made about non-international commercial parties as it is for international commercial parties. If that assumption is plausible, then perhaps appeals under the Alberta Act could be severely restricted or excluded for commercial arbitration while being maintained or made more accessible for consumer, family and other arbitration.

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[87] This acronym stands for "United Nations Commission on International Trade Law."

[88] See for example the International Act.

[89] J Brian Casey & Janet Mills, *Arbitration Law of Canada: Practice and Procedure* (Huntington, New York: Juris Publishing, Inc, 2005) at para 9.1.1.

[90] *Commercial Arbitration Act*, SNS 1999, c 5, s 48.

[91] Arts 940, 940.6, and 947 CCP.

[110] It is important to remember that, even if court appeals were eliminated for some or all kinds of arbitration, a party could still apply to court in appropriate circumstances to set aside an arbitral award under section 45 of the Alberta Act. This statutory procedure is the equivalent of judicial review and addresses procedural issues relating to jurisdiction, fairness and fraud.[92] So judicial intervention would remain available to protect parties in those situations. Parties cannot agree to vary or exclude that protection.[93]

B. The British and Australian Approach

[111] Some jurisdictions ostensibly allow an appeal to court by leave, but make such leave extremely difficult to obtain by enacting every conceivable barrier to it. Britain and some Australian states have taken this statutory route.

[112] Britain's *Arbitration Act 1996* provides:[94]

> **Appeal on point of law**
>
> **69(3)** Leave to appeal shall be given only if the court is satisfied –
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award–
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

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[92] Jonnette Watson Hamilton, "Chapter Six: Arbitration" in Julie Macfarlane, ed, *Dispute Resolution: Readings and Case Studies*, 2d ed (Toronto: Edmond Montgomery Publications Ltd, 2003) 615 at 656, n 7.

[93] Alberta Act, s 3.

[94] *Arbitration Act 1996* (UK), c 23, s 69 [British Act].

> (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

[113] Section 69(3)(a) still contains Britain's original 1979 precondition for leave but Parliament has since added considerably to the requirements. *The Nema* test is now statutorily enshrined in section 69(3)(c)(i). That high hurdle is lowered a bit in section 69(3)(c)(ii) but only if a general public importance test is also met. And a final, broad requirement in section 69(3)(d) makes it quite clear that courts will not easily become involved in arbitral matters.

[114] Concerning the question of law being appealed, Britain takes the opposite approach to section 44(3) of the Alberta Act. To obtain leave to appeal, the court must be satisfied under section 69(3)(b) of the British Act "that the question is one which the tribunal was asked to determine."[95] Unlike in Alberta, the party *must* first raise the question of law at the arbitration in order to appeal it later. The British Act's drafters thought it would be a "retrograde step" to incorporate any "old and long discarded common law rules relating to error of law on the face of the award."[96] So the British Act reversed the previous case law. Ironically, however, British applications for leave can still face similar issues as in Alberta: must the exact question of law be explicitly raised at the arbitration or does it suffice if the question of law were more indirectly raised simply by being integral to the resolution of the dispute?[97]

[115] The British Act applies both to non-international and international arbitration. It has been speculated that the United Kingdom's desire to maintain its position as a forum for international arbitrations may account for the tough hurdles it has placed in the way of all leave to appeal.[98]

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[95] British Act, s 69(3)(b).

[96] Departmental Advisory Committee, "DAC Report on Arbitration Bill" (28 September 2006) at Ch 2, para 286ii, online: Practical Law Company <http://arbitration.practicallaw.com/5-205-4994>.

[97] Bruce Harris, Rowan Planterose & Jonathan Tecks, *The Arbitration Act 1996: A Commentary*, 4th ed (Oxford: Blackwell Publishing Ltd, 2007) at 337, para 69H.

[98] Chapman at 414. For international arbitrations, it is estimated that only 25% of leave applications under the British Act are granted: Hilary Heilbron, *A Practical Guide to International Arbitration in London* (London: Informa Law, 2008) at 121. Section 69 of the British Act is currently being reviewed by an Advisory Committee chaired by Lord Mance, but to date no final report has been issued.

[116] There is no such dual application, however, in the Australian states of New South Wales, South Australia and Victoria, which have all recently enacted Britain's appeal provision in their new non-international arbitration statutes.[99] In fact, the Australian versions are even tougher. Section 69(2) of the British Act allows an appeal on a question of law to be brought by consent of the parties *or* by leave of the court. The new Australian model requires both unanimous party consent *and* leave before an arbitral award can be appealed on a question of law.

[117] This new uniform model results from the work of Australia's Standing Committee of Attorneys-General. The consultation draft act contained no provision for appeal at all. Instead, it proposed that parties could apply for court determination of a question of law with the consent of all parties or of the arbitrator. However, the court must not entertain the application unless it is satisfied that the determination "might produce substantial savings in costs to the parties."[100] Clearly, this approach did not survive the consultation process and was replaced in the uniform model by an appeal on a question of law -- but with the toughest leave requirements possible.

C. Consultation Issues

ISSUE 19

Is legislative reform needed in Alberta to address the availability of court appeal from an arbitral award?

ISSUE 20

Should the Alberta Act continue to provide a right of appeal where the parties have included it in their arbitration agreement? If so, on what grounds should such an appeal be possible – fact, law, or mixed fact and law?

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[99] *Commercial Arbitration Act 2010* (NSW), s 34A; *Commercial Arbitration Act 2011* (SA), s 34A; *Commercial Arbitration Act 2011* (Vic), s 34A.

[100] Standing Committee of Attorneys-General, "Consultation Draft of Commercial Arbitration Bill 2009" (15 October 2009) at 30, s 27(1), online: New South Wales Department of Attorney General and Justice <www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_pastconsultations >.

ISSUE 21

Should the Alberta Act continue to provide an appeal on a question of law by leave of the court regardless of the parties' agreement?

ISSUE 22

If an appeal by leave remains available, should that leave be:

(a) relatively easy to obtain, with fewer barriers;

(b) difficult to obtain, with more or tougher barriers; or

(c) nearly impossible to obtain, as in Britain and Australia?

ISSUE 23

If appeals continue to be available:

(a) Should the Alberta Act distinguish between

(i) commercial arbitration and

(ii) consumer, family and other arbitration?

(b) If such a distinction is made, should different appeal models be enacted for each group?

(c) If so, what access to appeal should each group have?

ISSUE 24

Are there other ways to resolve the issues involved in appeal of arbitral awards?